CJEU's Independence in Question, Part IV

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In parts I, II, and III of the *Verfassungsblog* series retelling the story of ousting AG Sharpston from the Court of Justice of the European Union before the expiration of her mandate set in primary law (and further reflections in the NYU Jean Monnet Working Paper), the unlawful dismissal – pointing in the direction of the lack of independence of the Court of Justice – was chronicled through a legal lens. In sum, an unlawful decision of the Member States dismissing a sitting member of the Court was amplified by an equally unfathomable decision of the Vice-President of the Court of Justice to not provide AG Sharpston with the necessary judicial protection in light of the outright unlawful Member State activity. This was a direct interference with the independence of the Court of Justice. A sitting member of the Court was sacked by the Member States, with the Vice-President declaring that the Court is not structurally independent.

It is in this vein that the fourth part of this story is now ready to be told.

On 6 October 2020, after the first three acts, the General Court issued three Orders (Case T-180/20, Case T-184/20, and Case T-550/20), which effectively dismissed the appeals brought by AG Sharpston against the applicable defendants. Yet these Orders were not ordinary orders. In fact, they had been directed, if not pre-empted, by the Vice-President of the Court of Justice, given that in Cases C-423/20 P(R) and C-424/20 P(R), Judge Silva de Lapuerta said that AG Sharpston had no 'prima facie' chance of success. The Vice-President of the Court of Justice abused the *ex parte* appeal against the interim order of Judge Collins in the General Court, which (correctly) suspended the questionable appointment by the Member States of 'AG' Rantos in a situation where it was evident that there was no vacancy on the Court. The Vice-President *de facto* decided the case for the General Court (not to mention, the errors of law that the Vice-President went on to commit), and by proclaiming the lack of structural independence of the institution, inflicted grave harm on the Court's reputation and the prestige of the European project.

On 16 December 2020, AG Sharpston brought a much awaited appeal against two of the three Orders of the General Court, which *de facto* implemented the Orders of the Vice-President of the Court of Justice – Case C-684/20 P, *Sharpston v Conference of the Representatives of the Governments of the Member States*, and Case C-685/20 P, *Sharpston v Representatives of the Governments of the Member States*. These are now pending before the Court of Justice.

So what is now at stake? In effect, AG Sharpston is asking the right questions, that the Vice-President of the Court of Justice clearly got her Orders very wrong, and attempted to silence to ousted AG Sharpston through an abuse of *ex parte* procedure brought by the Member States. Whilst the full range of pleas is not known

at this time beyond the meticulous reporting by Joshua Rozenberg, it is as much clear that she asks the following – are decisions made by 'common accord' of the Member States pursuant to Article 253 TFEU, within the scope of the EU Treaties, shielded *absolutely* from judicial review? That was the *de facto* assertion of the Vice-President of Court of Justice in her Orders, which now the Court has to review in a broader composition.

The answer, of course, is a definitive *no*. Answering in any other way would remove the principle of the rule of law from the list of EU's values, as it would imply that the EU Treaties do not bind their Masters, even when the latter act in outright violation of the spirit and the letter of the law, including even the most rudimentary legal intuitions set out with clarity, such as the security of tenure of the members of the Courts to guarantee the independence of the judicial branch from direct interference leading to appointments without a vacancy, and dismissals in direct violation of the Treaty-based security of tenure. Such behaviour of the Member States undoubtedly falls short of the foundational assumptions on which the Union, as well as the majority of its Member States rest. Moreover, if a press release can be subject to judicial review, so can a decision of the Member States acting within Article 253 TFEU.

Whilst this appeal is brought, the lawful composition of the Court remains in question. To date, 'AG' Rantos has not delivered a single Opinion at the Court. In other words, the secret swearing-in ceremony notwithstanding, the 'AG' has – rightly – not assumed the role of the Advocate General at the Court of Justice. As contended, the presence of 'AG' Rantos means that question of the lawful composition of the Court of Justice remains. As put by Judge Collins in his initial interim measures Order in Case T-550/20, "*the negative consequences of replacing a lawfully appointed office holder by someone whom may ultimately be deemed to have been appointed unlawfully, are self-evident*", and that the entry into office of a new AG replacing AG Sharpston "*generate challenges as to the composition of the Court of Justice, thereby impugning the validity of its judgments*". We could not agree more. Worse still, should the questionable appointment of 'AG' Rantos be cleared as 'legal', the lawfulness of the Court's composition pre-dating it could be brought into question, as Carl Baudenbacher explained.

The appeal that has just been brought by AG Sharpston could re-establish the trust in the Court's independence, in theory, by clarifying that ruthless unlawful actions of the Member States that breach the EU Treaties and, in particular, interfered with the composition of the independent institutions established under EU law should be subject to judicial review. Deciding in this vein will be vital for the Court of Justice to prove that it is worthy of a name. It is, however, not enough.

Theory is nothing without practice. If the Court is to quickly deal with the matter, the right course of action would be for all members of the Court (excluding 'AG' Rantos, of course) to deprive him of his office, and remove him from the Court, in line with the rigid and exhaustive procedure set down in the Statute of the Court, annexed to the EU Treaties. By doing this, the Court would not only stand for its own independence, but also exclude any fall-out from this low-point, which has a potential of bringing devastating effects to the European project as such, not

merely the Court's own standing within the fabric of Union institutions. Uniting theory and practice will be key. AG Sharpston's appeals play the crucial role here, since a simple removal of an unlawfully appointed member from the bench will not be enough at this point, given all the harm done to the idea of the Union as a Union based on the rule of law by the hasty secretly prepared Orders of the Vice-President, which did not give the Court any chance to take a breath, and try to save face in the context of an on-going assault on its independence by the Member States.

Another way to unite theory and practice and to remove the lingering questions about the lawful composition of the Court of Justice is also possible. 'AG' Rantos could do the honourable thing and resign from the Court of Justice. This procedure is also set down in the Statute of the Court, annexed to the EU Treaties. Then, with a vacancy having duly arisen, the eminent and distinguished Greek jurist, could be reappointed to the Court of Justice in a lawful manner, fully in line with Article 253 TFEU. This would extinguish any lingering doubt, going forward, that linger about the lawfulness of the Court's composition. However attractive, this course of action is less preferable to a clear stance of *all* the members of the Court acting together to dismiss an unlawfully appointed member forced upon them through a direct unlawful interference by the Member States.

The legitimacy of the Court of Justice as a Court is at stake, and the new development of AG Sharpston taking the case back to the Court is truly welcome. That is despite it being insufficient, as of itself, to undo the damage done to the Court of Justice's independence. This story will continue to be followed closely, despite the deafening silence from others.
